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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

NO. 79-1096

JUDITH LEIGH PEARSON,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT
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NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Judith Leigh Pearson v. State of Texas*,

587 S.W.2d 393 (Tex.Crim.App. 1979), and is reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WHETHER THE SEARCH IN WHICH EVIDENCE WAS SEIZED IN PETITIONER'S APARTMENT ON APRIL 9, 1976, WAS JUSTIFIED BY THE INITIAL INTRUSION THAT BROUGHT THE POLICE OFFICERS TO THE PREMISES?

II. WHETHER *MINCEY V. ARIZONA*, 437 U.S. 385 (1978), SHOULD BE APPLIED RETROACTIVELY ON THE FACTS OF THIS CASE?

III. WHETHER THE HANDWRITING SAMPLES INTRODUCED IN EVIDENCE IN THIS CASE SHOULD HAVE BEEN EXCLUDED AS THE PRODUCT OF AN ILLEGAL ARREST?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Texas Code of Criminal Procedure Article 14.03 provides:

> Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.

STATEMENT OF THE CASE

At 6:00 p.m. on April 9, 1976, Petitioner told a neighbor at the apartment complex to call security. When security was contacted, it was discovered that Petitioner had already telephoned security. Although the record is unclear as to who called, the Houston Police Department was summoned to Petitioner's apartment at around 6:45 p.m. to investigate a death. Three officers arrived at the scene, where they were escorted by Petitioner's neighbor who was a former security guard at the apartment complex, to Petitioner's daughter's bedroom. There they found Tamara, the three year old child, dead. The officers noticed that Tamara had a half-torn piece of notebook paper pinned on her blouse.

On it was a note written with a red pen. Because of the note's contents and the presence of a bruise on the child's neck, the officers suspected Tamara had been murdered.

The officers proceeded to examine the items in the bedroom. They detected no signs of a break-in. On top of a chest of drawers, however, they did find and seize the instrument that was used to strangle the victim. There is no evidence on the record that they opened any drawers or searched closed areas in the bedroom.

Thereafter, the officers were informed by the Petitioner that she did not know who "could have done such a thing" but suspected that it might have been a burglar. However, the officers testified that there was no evidence of a forcible entry. One officer was informed by a couple present at the scene that Petitioner had a "do not disturb" sign on her front door that afternoon. A female officer testified that when Petitioner was asked about the note, she said she could not remember what happened to it, but she may have thrown it away. Further, the officer testified that Petitioner gave another officer instructions as to where the note might be and permission to look for the note. The two male officers went through the kitchen to reach the back door and search for the note in a garbage can; but it was dark and they did not find the note.

The only other evidence that was seized that evening was a blue canvas binder which contained papers and notebooks, located on top of a T.V. tray in the living room. One officer testified that he picked up the binder because he wanted to see whether it contained the missing half piece of notebook paper. Besides the paper and notebooks inside the folder, the officer found a pen; however, he did not find the missing piece of paper. Contrary to Petitioner's statement in her petition, there is no testimony in the record that the officer read the contents of any of the materials found in the binder.

The record also does not reflect that any other search was conducted that evening.

Petitioner was requested to accompany the officers to the police station to answer some questions. She voluntarily agreed to go with the officers, and there is no evidence in the record that, at the time, she was under arrest or under suspicion of having committed a crime. The next morning, two police officers were instructed to go to Petitioner's apartment and find a note that said "do not disturb". One of the witnesses, an officer, who testified was asked the following question by the prosecutor: "your supervisor, do you recall or if you did, have this defendant [*sic*] instructions as to where the note might be found and permission to go look for it?" "Yes, Sir. She told us it was in her housecoat pocket in her bedroom." The officers arrived at the apartment between 9:00 a.m. and 10:00 a.m. They did not find the note in Petitioner's housecoat pocket; however, they located the note in the trash container on Petitioner's back porch. After this morning search, there is no evidence that the officers ever returned to Petitioner's apartment.

The record does not indicate the time at which Petitioner was placed under arrest; however, the State prosecutor stated during the trial that she was under arrest only when all incriminating circumstances were discovered. The record does reflect that on the fourth day of her detention, she was before a magistrate. Prior to this and on the same day, she had agreed to provide handwriting samples to an officer. There is no evidence in the record that she was questioned during her four day stay. Nor is there evidence that she was not allowed to visit with her family. Instead, the record reflects that a State witness testified that he observed Petitioner visiting with a minister and a friend but he did not know whether she visited with anyone else.

At Petitioner's trial, defense counsel objected to the

admission of the notebook and its contents as well as the handwriting samples on Fourth Amendment grounds. The trial court overruled his objections, and the items were admitted into evidence. Petitioner did not object to the "do not disturb" note when it was offered and later admitted into evidence.

The Texas Court of Criminal Appeals affirmed the conviction principally on the grounds that *Mincey* was not retroactive. In doing so, it merely accepted in one sentence and without any analysis whatsoever, Petitioner's argument that the search and seizure would otherwise have been in violation of the Fourth Amendment.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE TRIAL COURT CORRECTLY ADMITTED INTO EVIDENCE THE NOTEBOOK AND ITS CONTENTS DURING PETITIONER'S TRIAL.

A. The Police Officers Properly Seized the Evidentiary Items in Plain View Where Their Presence on the Premises was Pursuant to a Report of a Dead Person at Petitioner's Apartment.

Petitioner, on direct appeal to the Texas Court of Criminal Appeals, only contended that the state trial court had erred in admitting into evidence the binder and its contents (listed as exhibits 1, 3, 4, and 16) over Petitioner's objection, since the items were the product of an illegal search.[1] The only other ground for review

[1]These specific evidentiary items are (1) State Exhibit No. 1, a handwritten story entitled "My Perpetual Nightmare" found inside the blue binder on top of a T.V. tray in Petitioner's living room; (2) State Exhibit No. 3, a blue canvas three-ring binder with five hole lined papers inside, some with writing; (3) State Exhibit No. 4, a yellow notebook with three hole lined looseleaf paper with nine typed pages, found inside the same binder; and (4) State Exhibit No. 16, one white Bic pen with red ink, found inside the same binder.

before the Texas Court of Criminal Appeals was that the handwriting samples also should have been excluded at the trial since those samples were the product of an illegal arrest. Respondent notes that his response is limited to the grounds raised and considered in the Texas State Courts. In reply to Petitioner's first ground, there is no question that the police officers were called to the scene of the crime to investigate the victim's death. Thus, they rightfully gained access to enter Petitioner's apartment to investigate the report of a dead body on the premises, and it was not necessary for the officers to obtain a warrant before entering Petitioner's apartment. *Cf. Mincey v. Arizona*, at 393. The issue in dispute is whether the ensuing seizure of the binder and its contents was justified. Petitioner contends that the items seized in the living room were the products of an illegal search.

This Court has held in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that where the initial intrusion that brings the police within the plain view of the item "is supported, not by warrant, but by one of the recognized exceptions to the warrant requirement," then the seizure is legitimate. *Id.* at 465. In this case, the officer was not searching for incriminating evidence against the Petitioner, but was only looking for the other half piece of paper. The binder was on top of a T.V. tray; and, thus, was in plain view of the officer. It is irrelevant that the binder was later discovered to contain evidence that was incriminating against the Petitioner. *Id.* at 466.

The evidence seized was obtained within the limits of the plain view doctrine. First, one of the limitations is that plain view of the article is alone not sufficient to

justify its warrantless seizure absent exigent circumstances. Here, this criterion is met, since the officers were called to the scene of a crime where a dead body was present. In such a situation, even under *Mincey*, the seizure of items in plain view is permissible. U.S. at 393. Second, discovery of the evidence in plain view must be inadvertent. To meet this requirement, the police officers must not anticipate the discovery of the evidence. Clearly, this was not the case when the items were seized. Thus, the search was reasonable since in the officer's belief he was seizing items in plain view that might be tied to the criminal activity. *See, Michigan v. Tyler*, 436 U.S. 499 (1978). Further, the record reflects that when the officer opened the binder, it contained papers that had the same line ruling as the note on the victim. Based on these facts it was not necessary to procure a search warrant, and the search was valid under the plain view doctrine.

B. The Search Conducted by the Police Officers was Reasonable and Probably Consented to by the Petitioner.

As this Court has previously held, the relevant test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Coolidge v. New Hampshire, supra* at 2042. The question of whether the search is reasonable depends upon "the facts and circumstances — the total atmosphere of the case, . . . those facts and circumstances must be viewed in light of the established Fourth Amendment principles . . ." *Chimel v. California*, 395 U.S. 752, 765 (1969). The Fourth Amendment explicitly states that it only prohibits unreasonable searches.

The facts in this case fail to support any proposition that the search was unreasonable. First, the officers did not conduct an exhaustive and intrusive search, as was the case in *Mincey*. The search did not last four days, but only continued to the next day since the officers had been hindered by darkness when looking for the "do not disturb" note. Moreover, it appears from one of the officers' testimony at trial that the search on April 10 was consented to by Petitioner. Further, the officers did not open drawers, closets and cupboards and inspect their contents. There is no evidence that every item in the apartment was closely examined or that the complete apartment was cursorily examined. In fact, the testimony indicates that any search conducted was called for by the surrounding circumstances. For example, the officers examined the windows and doors in the apartment for evidence of a forcible entry. They testified that there was none. Also, the officers looked inside some trash located outside of the apartment only after being told by Petitioner that she might have thrown away the "do not disturb" note. The only items seized that evening were in plain view. In sum, the record does not reflect that the search was unreasonable and indicates consent by Petitioner.[2]

II.

MINCEY V. ARIZONA SHOULD NOT BE APPLIED RETROACTIVELY BASED ON THE FACTS OF THIS CASE.

In *Williams v. United States*, 401 U.S. 645, 651 (1974), this Court stated: "we have held . . . that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights." *Id.* at 651. With this in mind, this Court has, however, provided some guideline with regard to retroactive application of constitutional rules

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[2]Research has disclosed no case by a court that has directly addressed the issue whether *Mincey v. Arizona* should be applied retroactively. Therefore, it appears to be too early in the development of the *Mincey* jurisprudence for this Court to address its retroactivity.

in criminal cases. In *United States v. Peltier*, 422 U.S. 531, 535 (1975), this Court discussed the question of when a ruling in criminal case should be given retroactive effect:

> In those cases "[w]here the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of the guilty verdicts in the past trials," . . . the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the fact-finding process, the Court has concluded that any such new constitutional principle would be accorded only perspective application. . . .
>
> [Also, this Court has] recognized that the introduction of evidence which has been seized by law enforcement officials in good faith compliance with then-prevailing constitutional norms did not make the courts "accomplices in the willful disobedience of the Constitution they are sworn to uphold." . . .
>
> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that the evidence they had seized was admissible at trial, the "imperative of the judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

Id. at 535-536.

Under *Peltier*, three issues should be considered: (1) Did the evidentiary items that were seized relate to the integrity of the fact-finding process; (2) when the items were seized, were the law enforcement officers complying in good faith with the then prevailing constitutional standards; and (3) was the ruling in the criminal case a new constitutional principle.

First, the items in issue that were seized were solely physical evidence. Without doubt, this type of evidence does not raise any serious question as to the accuracy of the guilty verdict since the note and papers were reliable. Therefore, the items admitted into evidence did not raise any question as to the actual truth-finding process of Petitioner's trial. The first criterion is satisfied.

Second, as the Texas Court of Criminal Appeals held, when the search was conducted and the trial was held, Texas courts allowed homicide scene investigations. *See, Allen v. State*, 536 S.W.2d 364 (Tex.Crim.App. 1976); *Tocher v. State*, 501 S.W.2d 921 (Tex.Crim.App. 1973); *Brown v. State*, 475 S.W.2d 938, 948-50 (Tex. Crim.App. 1971); *Parsons v. State*, 271 S.W.2d 643 (Tex.Crim.App. 1954). Therefore, in and prior to 1976, the Texas courts recognized what has been called a "murder scene exception" rule that permitted a warrantless search of an area where a homicide had occurred.

Besides Texas, other states have recognized this rule as being consistent with the Fourth and Fourteenth Amendments. *See, e.g., People v. Wallace*, 31 Cal.App.3d 865, 107 Cal. Rptr. 659 (1973); *Lonquest v. State*, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972); *State v. Oakes*, 129 Vt. 241, 276 A.2d 18, *cert. denied*, 404 U.S. 965 (1971); *State v. Chapman*, 250 A.2d 203 (Me. 1969); *Stevens v. State*, 443 P.2d 600 (Alaska 1968),

cert. denied, 393 U.S. 1039 (1969).

Therefore, the Texas Court of Criminal Appeals properly held that since the search and the trial occurred before the decision in *Mincey*, *Brown v. State* was still good law. It follows that the police officers acted in good faith under existing Texas law when they seized the items at Petitioner's apartment, and the trial court was applying existent case law when it admitted the items into evidence.

The last question to consider is whether the Supreme Court enunciated a new principle in *Mincey v. Arizona*. Without dispute, prior decisions by this Court recognized warrantless searches in "emergency situations" or "exigent circumstances."[3] What constitutes "exigent circumstances" or emergency situations has never been clearly defined by this Court. Instead, this Court delineates the exceptions on a case by case basis. As Mr. Justice Stewart noted in the majority opinion in *Coolidge v. New Hampshire*, *supra*:

> With respect to searches and seizures carried out on a suspect's premise, the conflict has been over the question of what qualifies as an "exigent circumstance." It might appear that the difficult inquiry would be when it is that the police can enter upon a person's property to seize his "person *** papers, and effects," without prior judicial approval. The question of the scope of the search and seizure once the police are on the premise would appear to be subsidiary to the basic issue of when the intrusion is permissible. But the law has not developed in this fashion.

Id. at 477. Thus, *Mincey v. Arizona* only clarified

[3]*See, Coolidge v. New Hampshire, supra* at 454, footnotes 5-8 and *Vale v. Louisiana*, 399 U.S. 30 (1970).

whether a search at a homicide scene could be classified as an exigent circumstance and, therefore, did not announce a new principle in criminal law.[4]

III.

PETITIONER'S HANDWRITING SAMPLES WERE PROPERLY ADMITTED INTO EVIDENCE IN THIS CASE.

A. Petitioner's Arrest was Legal and Thus, the Handwriting Samples Were Appropriately Admitted Into Evidence.

As stated earlier, the record is unclear as to exactly when Petitioner was placed under arrest. It does reflect, however, that Petitioner voluntarily went to the police station to answer some questions. At whatever point Petitioner was placed under arrest, it was legal. Article 14.03 of the Texas Code of Criminal Procedure states that an officer can arrest a person found in suspicious places and under circumstances which reasonably show that the person has "been guilty of some felony or breach of the peace . . ." without a warrant.[5] In this case, once the police officer read the notes inside the binder seized at Petitioner's apartment on April 9, 1976, there would have been reasonable grounds to suspect that Petitioner was guilty of a felony offense because the binder contained a story which was written by Petitioner in such a fashion that the words used and the facts provided were similar to the circumstances surrounding the death of Petitioner's daughter. Therefore, the arrest of the Petitioner would have been warranted under the Texas statute. It follows

[4]*See, United States v. Jones*, 597 F.2d 485 (5th Cir. 1979), in which the Fifth Circuit held *Mincey v. Arizona* and *Michigan v. Tyler* should not be applied retroactively based on the facts of the case.

[5]*See*, page 2, herein.

that the handwriting exemplars were admissible provided that they were legally obtained. Since Petitioner voluntarily agreed to write the samples, they were properly admitted into evidence.

However, the question is raised by Petitioner that there was an unreasonable delay in taking her before a magistrate. Assuming *arguendo* that there was an unreasonable delay, the Fifth Circuit and Texas Courts have held that an unreasonable delay will only render the evidence inadmissible upon a showing of some causal connection between the delay and the evidence gathered. *See, e.g., Maloy v. State*, 582 S.W.2d 125 (Tex. Crim.App. 1979); *Myre v. State*, 545 S.W.2d 820 (Tex. Crim.App. 1977); *Whitaker v. Estelle*, 509 F.2d 194 (5th Cir.), *cert. denied*, 423 U.S. 872 (1975). Petitioner has failed to show any causal connection between the delay and the taking of the handwriting samples.

B. Assuming *Arguendo* that the Detention or Arrest was Illegal, Petitioner has Failed to Establish a Connection Between the Arrest and the Taking of the Handwriting Samples.

Petitioner argues that the handwriting exemplars were inadmissible evidence because they were the fruits of an illegal arrest, and she cites for authority *Davis v. Mississippi*, 394 U.S. 721 (1969) and *Brown v. Illinois*, 422 U.S. 590 (1975). These two cases are distinguishable from the facts in this case. In *Davis v. Mississippi*, the petitioner was not only subjected to fingerprinting but he went through extensive interrogation during the illegal arrest. This Court emphasized these circumstances in *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248, 2258 (1979). Here there is no evidence that Petitioner was subjected to interrogation. Further, *Brown v. Illinois* is distinguishable because of the clear illegal search that occurred after the arrest there. There is no flagrant official misconduct in this case. The warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966) were administered by an officer before asking the Petitioner if she would provide them with handwriting samples. To reiterate the facts in this case, Petitioner was allowed to visit with friends and possibly even with family, and she voluntarily decided to provide handwriting samples. The record does not reflect any interrogation during her four day stay at the jail. Thus, the handwriting samples were obtained legally since Petitioner has failed to show any causal connection between the arrest and the taking of the handwriting samples.

Moreover, *Brown v. Illinois* and *Davis v. Mississippi* are further distinguishable because they dealt with the taking of a confession and fingerprints, respectively. In *Gilbert v. State of California*, 388 U.S. 263 (1967), this Court noted that:

> If, for some reason, an unrepresentative [handwriting] exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis, in comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [state's] case at trial through the ordinary processes of cross-examination of the [state's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts."

Id. at 267. For this reason, handwriting samples should be treated differently from fingerprints and confessions because it is much easier for a defendant to challenge them at the trial. In this case, Petitioner had a handwriting expert testify on her behalf and thus had the opportunity to challenge her handwriting samples as well as the other handwritten evidence. It should also

be noted that Petitioner could have easily been compelled to provide handwriting samples at the trial since "[c]ompulsion of handwriting exemplars is neither a search or seizure subject of the Fourth Amendment protections, . . . nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination." *See, United States v. Euge*, ____ U.S. ____, 48 U.S.L.W. 4184, 4186, No. 78-1453 (U.S. Feb. 20, 1980). Petitioner's argument therefore must fail for any one or all of the reasons set forth above.

CONCLUSION

For the reasons above stated, Petitioner has failed to present facts indicating that a review of her contentions are needed and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, and a member of the Bar of this Court, hereby certify that three copies of the above Brief in Opposition have been served by placing same in the United States Mail, postage prepaid, certified, on this the ____ day of March, 1980, addressed to: Stephen E. Van Gaasbeck, 1227 S.W. Military Drive, San Antonio, Texas 78221.

GILBERT J. PENA
Assistant Attorney General